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ACTION
OCA 87-5486

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	X	
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		X
6. Ch/House Affairs		
7. Admin Officer		
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10. Constituent Inquiries Officer		
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Action Officer:	
Remarks:	

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O/CONGRESSIONAL AFFAIRS
OCA 87-5486

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 23, 1987

SPECIAL

OCA FILE Leg-LR

LEGISLATIVE REFERRAL MEMORANDUM

TO: Department of Defense - Sam Brick (697-1305)
Department of State - Lee Ann Howdershell (647-4463)
Department of Transportation - Tom Herlihy (366-9293)
Central Intelligence Agency
National Security Council

SUBJECT: Department of Justice draft bill -- "To provide for Federal court jurisdiction over certain serious crimes committed by civilians serving with or accompanying our armed forces overseas."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Circular A-19.

Please provide us with your views no later than November 13, 1987

Direct your questions to Gregory Jones (395-3454), of this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: Karen Wilson
Tom Stanners

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Charles E. Bennett, Chairman
Subcommittee on Seapower and Strategic
and Critical Materials
Committee on Armed Services
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

For many years you have introduced legislation to provide for federal court jurisdiction over certain serious crimes committed by civilians serving with or accompanying our armed forces overseas. Although the Uniform Code of Military Justice provides that civilians serving with, employed by, or accompanying the armed forces outside of the United States may be tried by courts-martial, see 10 U.S.C. 802(a)(11), the Supreme Court has held that the exercise of court-martial jurisdiction over such persons violates the Constitution, at least in peacetime. See Reid v. Covert, 354 U.S. 1 (1956); Kinsella v. Singleton, 361 U.S. 234 (1960). Similarly, although the Uniform Code of Military Justice also provides for court-martial jurisdiction over former servicemen for crimes committed prior to their discharge, see 10 U.S.C. 803(a), the Supreme Court held in Toth v. Quarles, 350 U.S. 11 (1955) that court-martial jurisdiction cannot be exercised in this situation. These and other cases have resulted in an unfortunate gap in the law which allows serious crimes to go unpunished.

H.R. 296, your bill designed to close this gap, is presently pending in the Committee on the Judiciary. The Department of Justice has long supported such legislation as necessary to eliminate this needless loophole. Our consideration of H.R. 296 has caused us to examine this issue in conjunction with the Department of Defense. As a result of considerable discussion between the two Departments, we have prepared the enclosed draft legislation which carries out the intent of Congress in originally enacting the Uniform Code of Military Justice that a court of the United States should have jurisdiction over crimes committed overseas by members of our military community. To a large extent, the bill draws on H.R. 296 and your similar bills in past Congresses.

The draft bill also addresses a related problem by setting out clearly the authority of military personnel to restrain and turn over members of the armed forces and certain civilians closely connected with the armed forces to a foreign government

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for trial for offenses committed overseas. A detailed analysis of the bill is also enclosed. I hope that you will consider introducing the bill as a substitute for H.R. 296.

While the bill has been prepared as an amendment to title 10 of the United States Code, its provisions could as logically be inserted in title 18. Regardless of which title the bill amends, the dual purposes of the bill -- closing jurisdictional gaps over crimes committed by civilians resulting from the above-cited line of Supreme Court case, and providing clear authority to arrest and turn over these civilians to United States civilian authorities or to a foreign government -- are so interrelated that the bill's provisions should be juxtaposed in one of these two titles in the United States Code.

Although the Covert, Singleton, and Toth cases were decided some time ago and while, as explained in the draft bill's analysis, foreign countries sometimes prosecute serious offenses by persons accompanying the armed forces abroad, the jurisdictional problems that remain are not trivial and can arise in serious cases. For example, the Covert case involved the murder of an Air Force sergeant by his wife at a United States base in England. Singleton was concerned with the unpremeditated murder of her child by the wife of a United States soldier accompanying her husband while he was stationed in Germany. In Toth the Supreme Court held that a former enlisted member of the Air Force could not be tried by a court-martial for a murder allegedly committed in Korea before his discharge.

If you have any questions concerning the draft bill or the analysis, I or other appropriate persons in the Department of Justice would be pleased to discuss them with you or your staff.

Sincerely,

John R. Bolton
Assistant Attorney General

Enclosure

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Sec. Title 10 of the United States Code is amended by adding following chapter 49 a new chapter 50, as follows:

"Chapter 50 -- Criminal Offenses Committed Overseas: Jurisdiction

"Sec.

"990. Criminal offenses committed by a member of the United States armed forces or by any person serving with, employed by, or accompanying the armed forces outside of the United States.

"991. Delivery to authorities of foreign countries.

"§ 990. Criminal offenses committed by a member of the United States armed forces or by any person serving with, employed by, or accompanying the armed forces outside of the United States

"(a) Any person who, while serving as a member of the United States armed forces, or serving with, employed by, or accompanying the United States armed forces, engages in an act or omission outside the United States and the special maritime and territorial jurisdiction of the United States --

"(1) which is expressly declared to be an offense if committed or omitted within the special maritime and territorial jurisdiction of the United States, as that term is defined in section 7 of title 18 of this code; or

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"(2) which is a violation of chapter 13 of title 21 if committed in the United States

shall, other than for a petty offense as defined in section 1 of title 18, be guilty of a like offense against the United States and subject to a like punishment as that provided by title 18 for offenses occurring within the special maritime and territorial jurisdiction of the United States, or by title 21 for offenses occurring in the United States.

"(b) Subsection (a) shall not apply to --

"(1) a member of the United States armed forces who, at the time of the return of an indictment or the filing of an information, is subject to trial by court-martial for an act or omission committed or omitted outside the United States and outside the special maritime and territorial jurisdiction of the United States; or

"(2) an employee of the United States who is a national of the country in which the act or omission occurred and who was hired by the United States in that country.

"(c) No prosecution may be instituted under this section if jurisdiction is authorized and prosecution has been previously undertaken by a foreign country for the same act or omission except upon the formal approval in writing by the Attorney General of the United States, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

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(d) Authorized personnel of the armed forces of the United States may, outside of the United States, apprehend and detain any person described in subsection (a) reasonably believed to have committed an offense described therein for the purpose of turning over such a person to civilian authorities of the United States for removal to the United States for judicial proceedings in relation to such an offense.

"§991. Delivery to authorities of foreign countries

"(a) Authorized personnel of the armed forces of the United States may, outside of the United States, apprehend and deliver any person serving with, employed by, or accompanying the United States armed forces outside the United States to the competent authorities of a foreign country in which such person is alleged to have committed a criminal offense if --

"(1) the competent authorities of that country request that such person be delivered to them for trial for an offense against the laws of that country; and

"(2) such delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

"(b) Authorized personnel of the armed forces of the United States may apprehend and deliver a member of the United States armed forces to the competent authorities of a foreign country in which such person is alleged to have committed a criminal offense if --

"(1) the competent authorities of that country request that such person be delivered to them for trial for an

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offense against the laws of that country; and

"(2) such delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.

"(c) A person subject to apprehension and delivery under subsection (a) or (b) of this section may be restrained under arrest or confinement until the completion of the trial or other final disposition of the action against such person.".

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Analysis

The bill has two separate but related purposes. The first is to close jurisdictional gaps in federal law that prevent trial by any United States authority, civilian or military, over crimes committed overseas by civilians employed by or accompanying our armed forces and by members of the armed forces who commit crimes but are discharged before they can be tried by court-martial. Congress clearly intended -- by providing in the Uniform Code of Military Justice that these persons were subject to trial by court-martial -- that such individuals would be tried by a United States, as opposed to a foreign, tribunal for crimes that directly impact the military community overseas. However, Supreme Court decisions have held that court-martial jurisdiction over such persons is unconstitutional. 1/ At the present time, the United States must rely on the judicial system of foreign governments to vindicate crimes like murder, rape, and aggravated child abuse

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1/ Article 2(a)(11) of the UCMJ (10 U.S.C. 802(a)(11)) provides that civilians serving with, employed by, or accompanying the armed forces outside of the United States may be tried by court-martial but the Supreme Court held that the exercise of court-martial jurisdiction over such persons violates the Constitution, at least in peacetime. See Reid v. Covert, 354 U.S. 1 (1956); Kinsella v. Singleton, 361 U.S. 234 (1960). Covert involved the murder of an Air Force sergeant by his dependent American wife at a United States base in England. Singleton involved a beating death of her young child by the wife of a soldier accompanying her husband in Germany. While Article 3(a) of the UCMJ (10 U.S.C. 803(a)) provides for court-martial jurisdiction over former servicemen for crimes committed prior to their discharge, the Court held that court-martial jurisdiction cannot be exercised in this situation. See Toth v. Quarles, 350 U.S. 1 (1955), a case in which a former Air Force enlisted member escaped prosecution for a murder he allegedly committed in Korea before his discharge.

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when these offenses are committed overseas by a civilian military dependent or employee against another United States citizen even if the offense takes place on one of our bases and has no impact at all on the local foreign community.

The second purpose of the bill is to spell out clearly the authority of the armed forces to restrain and turn over members of the armed forces and certain civilians closely connected with the armed forces to a foreign government for trial for crimes committed in foreign countries. Many of the status of forces agreements under which our armed forces, dependents, and civilian employees of the armed forces are allowed to enter a foreign country require that our military authorities turn over such persons for trial by the foreign country. The ability of members of the armed forces to carry out these agreements has been hampered by a lack of clear authority to restrain civilian dependents and employees overseas, and by judicial challenges -- although so far unsuccessful -- to the right of the armed forces to apprehend and turn over a service member who has committed a serious crime in a foreign country and then fled to the United States or to another foreign country.

The bill sets out a new chapter 50 in title 10 of the United States Code. Section 990 is designed to overcome the holdings of the Covert, Singleton, and Toth line of cases. Subsection 990(a) provides for United States District Court jurisdiction over certain crimes committed by persons serving with, employed by, or accompanying our armed forces abroad and, as limited by subsection (b), by former servicemen who committed crimes abroad while

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on active duty but who were discharged before they could be charged by military authorities and tried by court-martial. The crimes covered are those acts that are offenses if committed in the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. 7, and narcotics offenses as set out in chapter 13 of title 21. Special maritime and territorial jurisdiction crimes -- serious personal and property crimes like murder, rape, robbery, and assault -- and drug trafficking and possession offenses are those that most seriously impact on our overseas military community and which justify the effort and expense of bringing the alleged perpetrators and necessary witnesses to the United States for trial.

Venue for the actual prosecution of such a case would be governed by the general venue section, 18 U.S.C. 3238, which provides that for crimes committed outside of the jurisdiction of any particular federal judicial district venue lies in the district in which the offender is arrested or is first brought. Alternatively, section 3238 provides that if an indictment is returned before the defendant is arrested or returned to the United States, the indictment may be returned in the district of the offender's last residence in the United States or in the District of Columbia.

Subsection 990(b) contains two important limitations on the jurisdiction set out in 990(a). First, subsection 990(b)(1) provides that subsection (a) does not apply to a member of the armed forces who, at the time of the return of the indictment or the filing of an information is subject to trial by court-martial

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for the overseas offense. This limitation is included to ensure that the assertion of federal civilian court jurisdiction over former members of the armed forces in 990(a) is limited to just those persons: former, not active duty, members. Section 990 is not intended to reduce court-martial jurisdiction in any regard over members of the armed forces who are identified and charged with an offense under the UCMJ before their discharge, and subsection 990(b)(1) is necessary to make sure section 990 does not reach such persons. Unlike provisions in similar bills on this subject, section 990 never extends even concurrent civilian court jurisdiction over persons who could be tried by court-martial. 2/

The second limitation in subsection 990(b) is set out in 990(b)(2). It provides that subsection (a) does not apply to an employee of the United States "who is a national of the country

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2/ See, for example, H.R. 296 (100th Congress) which, in an attempt to overcome Toth v. Quarles, supra, would extend federal court jurisdiction over acts or omissions of members of the armed forces committed overseas that would be crimes if committed within the special maritime and territorial jurisdiction of the United States, and provides that courts-martial would have concurrent jurisdiction over such crimes. Although the obvious intent of H.R. 296 is to extend civilian court jurisdiction over former, not active-duty military personnel, the approach in that bill arguably would have the effect of allowing a civilian trial for an overseas offense committed by a person whose status as a member of the armed forces renders him subject to trial by court martial. A civilian trial for such a person is unnecessary and inappropriate, particularly in light of Solorio v. United States, __U.S.__ No. 85-1581 (June 25, 1981), which overruled O'Callahan v. Parker, 395 U.S. 258 (1969) and held that a person's status as a member of the armed forces subjected him to court-martial jurisdiction even for crimes committed in the United States, whether or not the offense was service connected.

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in which the act or omission occurred and who was hired by the United States in that country." This limitation is to avoid criticism from our allies regarding extraterritorial application of our laws against foreign nationals in their own country. Typically, our status of forces agreements do not contemplate that we will exercise criminal jurisdiction over local national civilians although we hire a number of such persons to perform various jobs for our armed forces overseas. Occasionally these persons commit crimes and an attempt to punish them under United States law rather than asking their own country to prosecute could cause serious and unjustifiable difficulties with the host country. Accordingly, subsection 990(b)(2) exempts local hire employees of the United States who are nationals of the host country from the jurisdiction asserted in 990(a).

Subsection 990(c) is designed to ensure that a person who has already been prosecuted by a foreign country for an offense may be prosecuted under subsection 990(a) by the United States for the same offense only when such a second prosecution has been approved by a high level Justice Department official. Since the Covert and Singleton cases, foreign governments have, on occasion, prosecuted military dependents and Department of Defense civilian employees for crimes committed overseas. There is, of course, no guarantee that they will do so in any particular case and certain types of cases -- domestic violence and child abuse in on-base quarters that has no impact on the local civilian community, for example -- are particularly likely to go untried. Nevertheless, subsection 990(a) would not oust a foreign country

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of jurisdiction over a Department of Defense employee or civilian (or for that matter over a former service member). In certain cases the foreign country may be willing to prosecute and foreign prosecution may be preferable to going to the trouble and expense of returning the defendant to the United States for trial. The Double Jeopardy Clause of the Fifth Amendment would not bar prosecution of a person for the same act for which he had been prosecuted by a foreign government, see Abbate v. United States, 359 U.S. 187 (1959) and Bartkus v. Illinois, 359 U.S. 121 (1959) holding respectively that successive state/federal and federal/state prosecutions for the same offense are not constitutionally barred since they were undertaken by separate sovereigns. Nevertheless, such successive prosecutions are strongly discouraged as a matter of policy and authorized only on the approval of a high level Justice Department official. See Petite v. United States, 361 U.S. 529 (1960). Subsection 990(c) is intended to ensure that a federal prosecution following a foreign prosecution is undertaken only after a similar careful review of the case by such an official. Reasons that might justify a federal trial following a foreign prosecution would parallel the reasons that would justify a federal prosecution following a state proceeding and would include such factors as infection of the foreign proceeding by incompetence, corruption, or witness intimidation or the choice of an entirely inappropriate charge by the foreign officials such as a simple assault prosecution in an aggravated rape case.

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Subsection 990(d) provides explicit authority for military personnel, outside of the United States, to apprehend and detain a person believed to have committed one of the offenses described in subsection 990(a). The apprehension and detention authority is for the sole purpose of turning over such a person to civilian authorities for removal to the United States and subsequent judicial proceedings. This subsection would allow, for example, the arrest of a civilian wife of a soldier stationed in Germany by military police who respond to a report of a domestic dispute in the couple's quarters and determine that the wife has killed the husband. Similarly, if military police receive word indicating that a quantity of narcotics is to be delivered to a particular sailor at a base in Japan, but do not know whether his supplier is another military person or a civilian, the subsection would allow the arrest of a civilian employee of the Navy who turns out to be the supplier. In short, the subsection does not provide military authorities any investigatory power over crimes by civilians beyond such inherent authority already possessed by military commanders to maintain good order and discipline in their commands, but it does allow members of the armed forces to apprehend and detain civilians when a military investigation results in a reasonable belief that a person described in subsection (a) has committed one of the crimes described therein.

Subsection 990(d) would also allow the detention of such a person, for example in a military prison but removed from any contact with military prisoners, until the person could be turned over to "civilian authorities" who would be responsible for

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removal of the person to the United States for preliminary judicial proceedings and a possible trial. The phrase "civilian authorities" would include such persons as Deputy U.S. Marshals, Drug Enforcement Administration Agents, and members of such civilian investigative components of the armed forces as the Naval Investigative Service.

It should be noted that subsection 990(d) only applies overseas. If a person to whom subsection 990(a) applies has returned to the United States before arrest, such a person may only be arrested and detained by civilian authorities. Moreover, 990(d) only applies to the narrow class of persons -- all of whom have voluntarily chosen to associate themselves closely with the armed forces -- to whom subsection 990(a) applies. It has no application to tourists or overseas employees of private companies.

Section 991 clarifies the authority of our armed forces overseas to deliver certain persons to competent authorities of a foreign country for trial for an offense against the law of the foreign country when such a procedure is authorized by a treaty or other international agreement to which the United States is a party.

Subsection 991(a) provides that members of the armed forces -- military police, for example -- may apprehend a civilian employee of the armed forces or an armed forces dependent and deliver such a person to the competent authorities of a foreign country in which the person is alleged to have committed a crime if the authorities of the foreign country ask that the person be

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given to them for trial and the delivery for such a purpose is authorized by a treaty or other international agreement to which the United States is a party. It would allow the apprehension of a civilian employee or military dependent living in Germany for the purpose of turning such a person over to German authorities for a crime committed in that country. Frequently a host country, like Germany, is willing to itself apprehend such a civilian believed to have committed an offense against German law. However, subsection 991(a) would allow our military authorities to make the arrest if that is more feasible. More importantly, it would allow our military authorities to apprehend and deliver over a civilian employee or military dependent in one foreign country who has committed a crime against the law of another foreign country. For example, a military dependent living in Germany may, while temporarily in Holland, commit a crime in violation of Dutch law for which trial by Dutch authorities is authorized by treaty or other agreement. Although we may be obligated by agreement to turn such a person over to Dutch authorities, no clear statutory authority exists to permit us to apprehend the person and comply with the agreement. Subsection 991(a) would provide such authority.

Subsection 991(a) must also be read in conjunction with 991(c). Subsection 991(c) provides that a person subject to apprehension and delivery under subsection (a) may be restrained under arrest or confinement by our armed forces until the final disposition of the case by the foreign country. Presently, no statutory authority exists for such pretrial confinement in the

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hands of our armed forces. Civilian employees of the armed forces and civilian dependents must be turned over to the foreign country whose laws such persons are alleged to have violated. In many foreign countries this may not be a problem, but in others pretrial delays and the unreasonably harsh conditions of confinement make pretrial confinement in the hands of our military authorities more appropriate. Taken together, subsections 991(a) and 991(c) allow military authorities to apprehend a narrow class of civilians -- all of whom have voluntarily closely associated themselves with our armed forces overseas -- accused of crimes against the laws of a foreign country and either turn them over to the foreign country for trial or hold them in confinement until the foreign country can try them. It should be emphasized that subsection (c) does not require our armed forces to keep the persons described in subsection (a) -- persons serving with, employed by, or accompanying our armed forces -- in pretrial confinement for an offense committed in a foreign country. Rather, it authorizes such confinement if, depending on all the facts of a particular case, including the wishes of the foreign country, such confinement is preferable to confinement in a foreign jail.

It should be emphasized that subsection 991(a) authorizes members of our armed forces to apprehend and deliver up civilians only overseas, not in the United States. By contrast, subsection 991(b) allows military authorities somewhat more latitude in apprehending and delivering up active duty members of the armed forces who have committed a crime against a foreign country.

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Subsection (b) allows military apprehension of members of the armed forces anywhere in the world, including in the United States. This subsection is designed to deal with the problem of military personnel stationed overseas who have charges pending against them in the host country or other foreign country which, by treaty or agreement, is entitled to try the person. In most cases, the United States has an obligation, under relevant status of forces agreements, to make the person available for trial.

Such military persons sometimes desert or otherwise absent themselves without authority and return to the United States or go to another foreign country. When ultimately apprehended by military authorities, these persons have judicially challenged the right of the military to return them to the foreign countries for trial. See e.g Holmes v. Laird, 459 F. 2d 1211 (D.C. Cir., 1972), cert. denied 409 U.S. 869 (1972); Williams v. Rogers, 449 F. 2d 513 (8th Cir. 1971), cert denied, 405 U.S. 926 (1972). So far, these challenges have proved unsuccessful, but have proven time consuming and wasteful of judicial resources. Typically, such a case involves considerable discussion of the applicable status of forces agreement, a subject with which most courts are unfamiliar. By clearly stating that members of the armed forces may apprehend and deliver to the authorities of a foreign country service members who, pursuant to treaty or other agreement, are subject to trial for crimes committed in that foreign country, subsection 991(b) would codify the holdings of the Holmes and Williams cases and forestall needless judicial challenges to the

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right of our military forces to take this reasonable course of action.

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